Filed 4/15/19 P. v. Caveney CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANIEL WILLIAM CAVENEY, Defendant and Appellant.	D074897 (Super. Ct. No. 16CR008703)

APPEAL from a judgment of the Superior Court of San Bernardino County, Michael Knish and Katrina West, Judges. Affirmed, with directions.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Randall D. Einhorn and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Daniel Caveney guilty of one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and two counts of making criminal threats (Pen. Code, § 422, subd. (a)).[1] The trial court placed him on probation for three years, subject to serving 365 days in local custody, which the court deemed satisfied based on Caveney having already spent 280 days in custody.

Caveney raises three issues on appeal. First, he contends that in not holding him to answer on the assault count at the preliminary hearing, the magistrate made a *factual* finding that precluded the prosecution from recharging the offense in an information. We conclude the magistrate made only a *legal* conclusion regarding the sufficiency of the evidence, which did not preclude recharging the offense. We further conclude sufficient evidence was adduced at the preliminary hearing for the assault count to survive a subsequent motion to dismiss.

Second, Caveney contends the trial court erred by concluding it lacked the authority to conduct a *Marsden*[2] hearing while criminal proceedings were suspended to evaluate Caveney's mental competency. Assuming (without deciding) the trial court erred, we conclude the error was not prejudicial.

---

1 Further statutory references are to the Penal Code unless otherwise indicated. For economy and readability, we sometimes refer to the assault with a deadly weapon count merely as "assault." There are no issues in this appeal regarding whether the assault constituted a simple assault rather than an assault with a deadly weapon.

2 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Finally, Caveney requests that we direct the trial court to correct the record to expressly reflect that he earned 280 days of conduct credits during his 280 days in custody. We will do so.

In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY[3]

Caveney's stepmother, Linda, died in December 2015, about six years after Caveney's father died. Linda purportedly signed trust documents leaving her house to Constance N., her best friend of 25 years who had lived with and cared for Linda during her terminal illness. After Linda died, Constance looked after the house and prepared it for sale. Caveney disputed Constance's claimed ownership of the house.

On April 6, 2016, Constance and her husband William went to check on the house. Unbeknownst to them, Caveney was inside. An altercation ensued during which Caveney made death threats to Constance and William as he approached them while wielding an ax over his head. Caveney pursued them and made additional death threats as they fled the home. Caveney later denied making any death threats and claimed he had acted in self-defense.

The prosecution filed a felony complaint charging Caveney with one count of assault with a deadly weapon (§ 245, subd. (a)(1); count 1), two counts of making

---

[3] Because Caveney's appeal raises only issues regarding pretrial procedure and sentencing, we provide only a brief factual and procedural summary here. We provide additional detail, as necessary, in the Discussion sections regarding each issue.

criminal threats (§ 422, subd. (a); counts 2-3), and one count of resisting a peace officer (§ 148, subd. (a); count 4).

At the conclusion of the preliminary hearing, at which only Constance and William testified, the magistrate held Caveney to answer on only the criminal threat counts.

After the prosecution filed an information realleging the dismissed assault and resisting a peace officer counts, Caveney moved to dismiss the charges under section 995. The trial court denied the motion as to the assault count and granted it as to the resisting count.

Soon thereafter, Caveney's appointed counsel raised a doubt as to Caveney's mental competence. Caveney insisted he was competent and told the court he was "firing" his appointed counsel. The trial court suspended criminal proceedings and appointed a professional to evaluate Caveney.

While criminal proceedings were suspended, Caveney repeatedly expressed a desire to represent himself due, in part, to dissatisfaction with his appointed counsel. The trial court found it lacked the authority to conduct a *Marsden* hearing while criminal proceedings were suspended pending the competency determination.

After the trial court ultimately found Caveney competent to stand trial, he made a *Marsden* motion, which the court denied.

Following a jury trial, Caveney was convicted of one count of assault with a deadly weapon and two counts of making criminal threats. The trial court placed

Caveney on probation for three years, subject to the condition (among others) that he serve 365 days in county jail, which the court deemed satisfied based on Caveney having already spent 280 days in custody.

Caveney appeals.

DISCUSSION

I. *Realleging the Dismissed Assault Count in an Information*

When a magistrate does not hold a defendant to answer on a particular offense, the prosecution may reallege it in an information, provided the magistrate did not make any factual findings that negate the occurrence of the offense. (See § 739; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 133 (*Pizano*).) In dismissing the assault count at the preliminary hearing, the magistrate explained, "[I'm] not satisfied at this point that the totality of the testimony shows that there was an action in furtherance taken for" the offense. Caveney contends this was a *factual* finding that precluded the prosecution from realleging the offense. We disagree. The magistrate expressed a *legal* conclusion as to the sufficiency of the evidence, which did not bar refiling of the assault charge. (See *People v. Rowe* (2014) 225 Cal.App.4th 310, 318 (*Rowe*) ["a court makes a legal conclusion when it accepts the prosecution's evidence, but determines there is insufficient evidentiary support for one or more elements of a charge"].)

A. *Background*

As noted, the prosecution filed a felony complaint charging Caveney with one count of assault with a deadly weapon, two counts of making criminal threats, and one count of resisting a peace officer.

Constance and William were the sole prosecution witnesses at the preliminary hearing. According to them, on April 6, 2010, they went to check on the house Constance inherited from her best friend, Linda. Constance knew Caveney "was under the impression that the home was lawfully his." As Constance entered the house, William read some papers that were plastered to the inside of the windows. He "immediately knew that something was wrong."

Inside, Constance and William saw Caveney sitting at the dining room table, smoking. Caveney asked loudly, "Who the fuck are you?" Constance countered, "Who the fuck are you?" When Caveney identified himself as the owner of the house, Constance responded in kind.

Caveney stood up, picked up an ax that had been leaning against the wall, raised it over his head or shoulders, and said, "Get out of the house. I'm going to kill you." According to Constance, Caveney "lightly lunged" toward her as he said this. According to William, Caveney "walked toward" them and came "within swinging distance," about two or three feet from Constance.

William grabbed Constance's arm and said, "We need to get out of here." As they got near the front porch, Caveney grabbed Constance's arm and tried to push her down.

From the front yard, Constance and William called 911. Caveney ran outside without the ax, "threw a bunch of papers down on the ground," looked at William, and said, "I'm going to stick a spear through your neck and kill you." Caveney went back inside the house and continued to yell death threats as Constance and William spoke with the 911 operator.

After Constance and William testified, Caveney's trial counsel argued the magistrate should not hold Caveney to answer on the assault count because there was no "act that by its nature would directly and probably result in application of force to a person" inasmuch as there was no "action or swinging towards either of the alleged victims." Counsel also argued the magistrate should dismiss the resisting a peace officer count because "we've heard no evidence of resisting arrest."

The prosecutor argued Caveney should be bound over on the assault count because Constance testified Caveney "lunged toward her with the ax overhead," and William testified this occurred "within striking distance." The prosecutor asserted this conduct was a "sufficient . . . motion, an act in advancement of making that injury or assault upon both of those people." The prosecutor submitted on the resisting count, acknowledging "[t]here was no evidence" on it.

The magistrate (Judge Bridgid McCann) first explained that the disputed ownership status of the house did not justify Caveney's conduct. The magistrate then turned to the merits of the assault count:

> "That being said, the Court does have some difficulties with Count 1, in that [Constance] said it was a slight lunge forward. [William]

> said that he took steps towards him with the weapon. Both indicated it was actually over the head and over the right shoulder. [¶] *The Court is not satisfied at this point that the totality of the testimony shows that there was an action in furtherance taken for Count 1*." (Italics added.)

Based on this reasoning and the prosecutor's acknowledgment regarding the resisting count, the magistrate held Caveney to answer on only the criminal threat counts.

The same day as the preliminary hearing, the prosecutor filed an information alleging the same four counts as the original complaint: assault with a deadly weapon, making criminal threats, and resisting a peace officer.

A few weeks later, Caveney moved to dismiss the assault and resisting counts under section 995, arguing neither was supported by sufficient evidence. The prosecution opposed the motion, arguing Caveney's conduct fell within the definition of assault articulated by the Supreme Court in *People v. McMakin* (1857) 8 Cal. 547, which includes " '[h]olding up a fist in a menacing manner, *drawing a sword or bayonet*, [or] presenting a gun at a person who is within its range . . . .' " (*Id*. at p. 548, italics added.)

The trial court (Judge Kyle Brodie) acknowledged "there is no daylight between what happened [in *McMakin*] and what happened here." After taking the matter under submission, the court denied the section 995 motion as to the assault count and granted it as to the resisting count. The court explained why it reached a different conclusion than the magistrate on the assault count:

> "I've done some more reading on th[e] subject. Based on my review of the cases and my review of the preliminary hearing transcript, construing the record in the light most favorable to the information, which is the standard that one would apply on review of this motion,

> I believe the evidence is sufficient to establish probable cause that, in fact, the defendant did commit an act sufficient to constitute an assault, or at least could be viewed that way by a reasonable finder of fact. . . . [¶] . . . [¶]
>
> "I realize [the magistrate] found the evidence to be insufficient. Based on my reading of the transcript, I guess I would say I disagree with her, . . . respectfully. I just read the transcript differently than she did . . . ."

B. *Relevant Legal Principles*

The magistrate's role at a preliminary hearing is to determine whether the prosecution has presented sufficient evidence to hold the defendant to answer. (§ 872; see *Johnson v. Superior Court* (1975) 15 Cal.3d 248, 252.) This requires a showing of " 'a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.' " (*People v. Slaughter* (1984) 35 Cal.3d 629, 636 (*Slaughter*).) The magistrate "does not decide whether defendant committed the crime, but only whether there is ' "some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." ' " (*Id*. at p. 637.) In making this decision, the magistrate may weigh the evidence, resolve conflicts, and assess credibility. (*Ibid*.)

The magistrate may make factual findings and/or legal conclusions at the end of the preliminary hearing. (*Slaughter*, *supra*, 35 Cal.3d at p. 638; *Rowe*, *supra*, 225 Cal.App.4th at p. 318.) "In the context of dismissal of charges at a preliminary hearing, a court makes a *factual* finding when, after resolving evidentiary disputes and/or assessing witnesses' credibility, it determines there is no evidentiary support for one or more

elements of a charge. Conversely, a court makes a *legal* conclusion when it accepts the prosecution's evidence, but determines there is insufficient evidentiary support for one or more elements of a charge." (*Rowe*, at p. 318, italics added.)

When the magistrate holds the defendant to answer on one offense but dismisses another, section 739 authorizes the prosecution to recharge the dismissed offense in an information if the evidence at the preliminary hearing showed the offense was committed and arose out of the same transaction as the related offense. (§ 739;[4] see *Pizano*, *supra*, 21 Cal.3d at p. 133.) "This rule is subject to the qualification" that an offense may not be recharged "if the magistrate made *factual findings* which are fatal to the asserted conclusion that the offense was committed. A clear example of this would be when the magistrate expresses disbelief of a witness whose testimony is essential to the establishment of some element of the corpus delicti." (*Pizano*, at p. 133.) Another example arose in the seminal case of *People v. Jones* (1971) 4 Cal.3d 660 (*Jones*), where the prosecution was barred from refiling rape, oral copulation, and sodomy charges after "the magistrate found, *as a matter of fact*, that [the alleged victim] consented to

---

4 Section 739 states in part: "When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney of the county in which the offense is triable to file in the superior court of that county within 15 days after the commitment, an information against the defendant which may charge the defendant with either the offense *or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed. . . .*" (Italics added.)

intercourse and that no acts of oral copulation or sodomy occurred . . . ." (*Id.* at p. 666, italics added.)

On the other hand, when "the magistrate either expressly or impliedly accepts the evidence and simply reaches the ultimate *legal conclusion* that it does not provide probable cause to believe the offense was committed, such conclusion is open to challenge by adding the offense to the information." (*Pizano, supra,* 21 Cal.3d at p. 133; see *People v. Superior Court* (*Day*) (1985) 174 Cal.App.3d 1008, 1019, fn. 5 ["[T]he following are legal conclusions of the magistrate: that the evidence is 'too weak' [citation]; that the People failed to prove malice [citation]; and of course the explicit phraseology that the evidence is 'insufficient.' "].)

The prosecution's recharging of a dismissed offense in an information is "subject to attack in the superior court under . . . section 995, to review by pretrial writ and, finally, to appellate review from the judgment of conviction." (*Pizano, supra,* 21 Cal.3d at p. 133.)

"When the defendant challenges the district attorney's election to include charges for which defendant was not held to answer at the preliminary hearing, '[t]he character of judicial review under section 739 depends on whether the magistrate has exercised his power to render findings of fact. If he has made findings, those findings are conclusive if supported by substantial evidence. [Citations.] If he has not rendered findings, however, the reviewing court cannot assume that he has resolved factual disputes or passed upon the credibility of witnesses. A dismissal unsupported by findings therefore receives the

independent scrutiny appropriate for review of questions of law." (*People v. Bautista* (2014) 223 Cal.App.4th 1096, 1101 (*Bautista*).)

" 'In summary, cases arising under section 739 recognize a clear distinction: findings of fact must be sustained if supported by substantial evidence, *but a finding of lack of probable cause, unsupported by any factual findings, is reviewed as an issue of law*. Absent controlling factual findings, if the magistrate dismisses a charge when the evidence provides a rational ground for believing that defendant is guilty of the offense, his ruling is erroneous *as a matter of law*, and will not be sustained by the reviewing court.' " (*Bautista*, *supra*, 223 Cal.App.4th at p. 1101.)

C. *Analysis*

On the threshold issue, we conclude the magistrate made a legal, rather than factual, determination.

The parties focus on the magistrate's determination regarding the first element of the offense of assault with a deadly weapon: whether the "defendant did an act with a deadly weapon . . . that by its nature would directly and probably result in the application of force to a person." (CALCRIM No. 875; see § 245, subd. (a)(1).)[5]

---

5 The trial court instructed the jury regarding the elements of the offense with CALCRIM No. 875,which, as given, states in part:

> "To prove that the defendant is guilty of [assault with a deadly weapon other than a firearm], the People must prove that:

The record shows the magistrate accepted the prosecution's evidence without resolving any conflicts or making any credibility determinations. Indeed, the magistrate, in her ruling, uncritically summarized Constance and William's testimony regarding Caveney's conduct. Defense counsel likewise accepted their version of events, but argued it was legally insufficient to establish an assault. In essence, the defense argued that picking up an ax, holding it over one's head or shoulder, and lunging toward another person is insufficient to satisfy the action-in-furtherance element of assault with a deadly weapon. The magistrate's apparent agreement with this characterization was a quintessentially legal determination regarding the sufficiency of the undisputed evidence. (*Pizano*, *supra*, 21 Cal.3d at p. 133; *Rowe*, *supra*, 225 Cal.App.4th at p. 318.)

This situation is unlike *Jones*, *supra*, 4 Cal.3d 660, in which the magistrate made findings, "as a matter of fact," that negated an offense (e.g., consent to intercourse, and the nonoccurrence of oral copulation or sodomy). (*Id.* at p. 666.) That is, the magistrate

---

> "1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person;
>
> "2. The defendant did that act willfully;
>
> "3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;
>
> "4. When the defendant acted, he had the present ability to apply force with a deadly weapon other than a firearm[;] AND
>
> "5. The defendant did not act in self-defense."

did not find as a matter of fact that Caveney did not lunge at Constance while holding an ax overhead. Rather, the magistrate accepted as a matter of fact that Caveney had done so, but concluded as a matter of law that such conduct was legally insufficient to constitute an act in furtherance of an assault.

Accordingly, because the magistrate made no factual findings or credibility determinations, we review the record independently to determine whether " 'the evidence supplied a rational ground for holding the defendant to answer.' " (*Rowe*, *supra*, 225 Cal.App.4th at p. 317.) We conclude that it does.

Our Supreme Court has long held that a defendant need not have actually swung a weapon at a victim to sustain an assault conviction: "In [*People v. Yslas* (1865) 27 Cal. 630], the defendant approached within seven or eight feet of the victim with a raised hatchet, but the victim escaped injury by running to the next room and locking the door. [The defendant] committed assault, *even though he never* closed the distance between himself and the victim, *or swung the hatchet*." (*People v. Chance* (2008) 44 Cal.4th 1164, 1174, italics added; see *McMakin*, *supra*, 8 Cal. at p. 548 ["Holding up a fist in a menacing manner, *drawing a sword or bayonet*, presenting a gun at a person who is within its range, have been held to constitute an assault."], italics added.)

Here, a jury could—and *did*—reasonably conclude that, had Constance and William not retreated from Caveney, his continued advancement upon them while wielding an ax would have directly and probably resulted in the application of force to

them, " 'even though [Caveney] never . . . swung the [ax].' " (*Chance, supra,* 44 Cal.4th at p. 1174.)

Accordingly, the trial court did not err by allowing the prosecution to reallege and pursue the once-dismissed assault count.

II. Marsden *Hearing*

After the trial court suspended criminal proceedings to afford Caveney a competency hearing based on concerns expressed by his appointed trial counsel (Matthew Magorien), Caveney told the court, "I'm firing him." Caveney contends this complaint triggered his right to a *Marsden* hearing, and that the trial court erred by concluding it lacked the authority to conduct one until after Caveney had been deemed competent. The Attorney General maintains there was no error because Caveney failed to unequivocally assert his right to a *Marsden* hearing, and, in any event, any error was harmless because the court eventually heard and denied a *Marsden* motion.

Based on our comprehensive review of the extensive record of the pretrial proceedings, we agree with the Attorney General that any alleged error was harmless. Accordingly, we will assume without deciding that Caveney sufficiently triggered his right to a *Marsden* hearing, and that the trial court erred by failing to conduct one based on the mistaken belief it lacked the authority to do so.

A. *Background*

At a hearing on January 4, 2017, defense attorney Magorien "declar[ed] a doubt" as to Caveney's competence to stand trial. The court (Judge Jon Ferguson) indicated it

would suspend criminal proceedings and appoint a doctor to evaluate Caveney. Caveney then addressed the court:

> "THE DEFENDANT: Okay. Your Honor – your Honor, can I say something –
>
> "THE COURT: Sure. [¶] . . . [¶] Well, I mean, your attorney may not want that, but—
>
> "THE DEFENDANT: I don't care. I'm firing him.
>
> "THE COURT: Okay. Well, not quite yet. Okay.
>
> "THE DEFENDANT: Well, I would like to say a few things about the 995 motion."

The court explained to Caveney that the section 995 motion was no longer before the court—it had been heard one month earlier. Caveney responded that he was not asking the court to rule on the motion, but wanted to point out that the prosecution did not timely file an information that conformed to the magistrate's rulings at the preliminary hearing. The court responded that Caveney was being represented by "two very competent attorneys." Caveney insisted he was mentally competent, and asked that either trial begin immediately or that the case be dismissed. The court suspended criminal proceedings and ordered that Caveney's competence be evaluated.

On February 8, 2017, the court issued a bench warrant for Caveney's arrest after he failed to appear for a hearing. That same day, Caveney faxed the court a document itemizing (in disorganized fashion) a litany of procedural complaints, including that (1) the charging document was inconsistent with the magistrate's findings at the preliminary hearing, (2) the charges against him must be asserted by way of grand jury indictment,

and (3) there "is no factual basis for the sanity hearing." Caveney's fax submission did not address his representation status.

At a February 24, 2017 hearing, the court (Judge Katrina West) noted it was still awaiting the results of Caveney's competency evaluation. Caveney, appearing in custody due to the prior bench warrant, addressed several of the procedural issues raised in his fax submission. He argued his section 995 motion "was messed up by [his] attorney" because it did not address the criminal threat counts. He further argued it was "just absolutely not fair" that he was being held in custody while the competency proceedings delayed his trial. Magorien stated for the record that "everything Mr. Caveney said is against the advice of counsel."

At the outset of a March 22, 2017 hearing, Caveney was represented by a deputy public defendant other than Magorien. Before counsel could state his appearance, Caveney stated, "I wish to represent myself, your Honor." Counsel advised that Magorien was on his way, so the court trailed the matter until he arrived. When Magorien arrived, an unreported bench conference ensued.

The court then noted it had received a psychologist's evaluation of Caveney, which found he was not competent. The prosecutor opposed the findings and requested a second evaluation. Over Magorien's objection, the court ordered a second evaluation. Against counsel's advice, Caveney addressed the court:

> "I would like to defend myself in this case. And . . . the reason is because of ineffective assistance of counsel. I have a list here of times that I believe that I was not represented properly by the public defender, and I would like to leave these with the Court today."

Magorien objected to the court's receipt of Caveney's papers, arguing the public defender's office still represented Caveney and "it has to remain at least until his competency is determined." The court agreed and directed Magorien to hold the papers. Caveney insisted, "I have an absolute right to represent myself in this case." The court explained, "For the record, the Court will not address Mr. Caveney's right to represent himself until and unless the Court has resolved the competency issues."

At a May 1, 2017 hearing, the court (Judge West) noted it was still awaiting the results of the second evaluation. The court also noted it had received a letter from Caveney "essentially asking to go pro. per." Caveney's letter read in part:

> "I have made numerous attempts to contact Mr. Magorien and Mr. Alexander from P.D. Office. They do not respond. [¶] I now feel that I have to represent myself in court for all matters.
>
> "I hereby fire the public defender and am now acting as my own attorney." [¶] . . . [¶]
>
> "The lawyers from the P.D. Office have not served me well. I am writing them today to inform them of my decision to represent myself."[6]

The court stated it could not address Caveney's request to represent himself because "[c]riminal proceedings are currently suspended" and the court "cannot do anything . . . until [it has] resolved the issue of his competency." Caveney complained about being "ambushed with this . . . competency hearing," which was prolonging his

---

6 The letter then addressed several issues regarding trial preparation.

time in custody. He asked that the case be dismissed, or that he be released on his own recognizance or have his bail reduced. Regarding his relationship with counsel, Caveney stated, "I thought that I was cooperating pretty well with Mr. Magorien. We did have some issues as far as him waiving some of my trial rights when I wasn't there, but . . . ." The court denied Caveney's requests.

At a June 12, 2017 hearing, the court (Judge Michael Knish) noted it had received the second competency evaluation, which found Caveney competent. The prosecution asked the court to follow the second evaluation. Against Caveney's wishes, Magorien asked the court to order a third evaluation as soon as possible. The court ordered a third evaluation.

Caveney told the court it was "unfair" he had been in custody for about four months pending the competency proceedings. He asked to be released on "leave" for one month to attend to personal matters. The court deferred the leave issue to Judge West, and explained to Caveney that the competency determination is a jurisdictional matter. Caveney responded that he agreed with the prosecution regarding his competency and asked that trial begin as soon as possible. Caveney then renewed his request to represent himself:

> "And may I also ask, your Honor, may I discharge my attorney, because he is doing me no good at all on this case, and I would like to be able to defend myself. I think I have an absolute right to defend myself in this case, and he has done nothing for me but got me incarcerated for the last four months -- [¶] . . . [¶] -- by this competency hearing ambush."

The court acknowledged it had the authority to conduct a *Marsden* hearing even when criminal proceedings are suspended, adding, "I think it has to be set for a *Marsden*." Magorien responded, "I think he wants pro. per. I think he wants a *Faretta*."[7] The court replied, "He wanted both, and they're different." Due to its schedule, the court continued the matter to the following day for a *Marsden* hearing before Judge West.

The next day, however, Judge West found she did "not have jurisdiction or legal authority to go forward with a *Marsden* motion" because criminal proceedings remained suspended pending receipt of the third evaluation. Magorien agreed. Caveney asked the court if he could change his plea, but the court reiterated that criminal proceedings were suspended.

At the next hearing (July 12, 2017), Caveney was represented by a deputy public defender other than Magorien. The court (Judge Knish) noted it had received the third evaluation, which found Caveney competent. After counsel submitted on the reports, the court found Caveney competent and reinstated criminal proceedings. The court then confirmed, "There's a mention of a *Marsden* motion. We're not doing that?" Defense counsel responded, "No. I believe a different Public Defender will be on this case, your Honor. So I don't think we need to address the *Marsden* hearing." Caveney said nothing. The court then set trial dates. After a brief recess, the court vacated its orders and

---

7 *Faretta v. California* (1975) 422 U.S. 806.

continued the matter to the next day so Magorien could be present. Caveney did not object.

The next day (July 13), Judge Knish reinstated his findings and orders from the previous day and set dates for further proceedings. Defense counsel noted the parties were discussing possible plea bargains.

At hearings on July 21, August 4, September 1, and September 5, 2017, the parties and the court discussed possible plea bargains. The court and defense counsel discussed extensively with Caveney the meaning and significance of strike offenses.

On September 6, 2017, the trial court (Judge Knish) heard pretrial motions. After a recess during which Caveney and Magorien were speaking to each other in open court, the court noted it was "eavesdropping . . . a little" and "hear[d] the word '*Marsden*,' and that always has to get [the court's] attention." Magorien confirmed to the court that Caveney desired a *Marsden* hearing, which Magorien stated he would oppose. The court cleared the courtroom for the hearing.

In the closed session, Caveney articulated five grievances with Magorien: (1) counsel did not "file a 995(a) [m]otion"; (2) Caveney had to travel 600 miles (he lived in northern California) to attend hearings on at least five occasions, and counsel "didn't explain the proceedings and didn't tell [him] what a strike was"; (3) counsel did not respond to Caveney's "50 notices and e-mails"; (4) counsel was "abusive" and "called

[him] names in court"; and (5) counsel performed incompetently by not highlighting an inaccuracy in Constance's testimony about the existence of a restraining order.[8]

Caveney also cited Magorien's "absolutely absurd" conduct in getting Caveney "incarcerated for seven months on this phoney incompetent-to-stand-trial issue." The court said it would not have Magorien respond to this criticism because the fact that the first evaluator "did opine that [Caveney was] not competent to stand trial . . . validates . . . the attorney's action . . . ." Caveney countered that the first evaluator "was a hack" who "was just writing or putting squiggly lines on the paper"—"she did not have anything like [the] protocol that the two other [p]sychologists had." The court interrupted Caveney and invited Magorien to respond to Caveney's cited grievances.

Magorien responded by explaining: (1) he filed a section 995 motion that was partially successful; (2) from "the very first hearing and every subsequent hearing when the D.A. made an offer, [Magorien] explained exactly what the offer was, including the consequences of a strike"; (3) Magorien and his colleagues "had hours of conversation with Mr. Caveney on the phone," and Magorien saved Caveney's emails and followed up on them after the court found Caveney competent; (4) Magorien acknowledged his personal "style may not mesh well with some . . . clients," and he apologized for any bad

---

8 During the 911 call, Constance and William told the operator they had obtained a restraining order against Caveney. In fact, they had merely submitted a "Letter of Agency" authorizing the police to take appropriate action against unauthorized occupants of the house. After the altercation, however, Constance and William obtained a formal restraining order against Caveney.

feelings; and (5) Magorien explained he had tactical reasons for not addressing Constance's apparent inaccuracy about the restraining order. Magorien described all the work he had done on the case, and expressed his desire to continue representing Caveney.

The trial court denied Caveney's *Marsden* motion. The court found Caveney's complaints "have been answered effectively," and the court did "not find that there's [an] irreconcilable breakdown in the relationship." Caveney does not challenge this ruling on appeal.

B. *Relevant Legal Principles*

Marsden "mandates a court hearing to determine whether a defendant's appointed counsel offers constitutionally inadequate representation when defendant requests substitution of appointed counsel. The legal principles governing a *Marsden* motion are well settled. ' "When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." ' " (*People v. Lara* (2001) 86 Cal.App.4th 139, 150.)

"[A] trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his

current counsel." (*People v. Lucky* (1988) 45 Cal.3d 259, 281; see *People v. Sanchez* (2011) 53 Cal.4th 80, 89-90.) The courts "do not necessarily require a proper and formal legal motion, but at least some clear indication by defendant that he wants a substitute attorney." (*Lucky*, at p. 281, fn. 8.)

A defendant is entitled to request substitution of counsel under *Marsden* even when criminal proceedings have been suspended to evaluate the defendant's competence. (*People v. Taylor* (2010) 48 Cal.4th 574, 600-601 (*Taylor*); *People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069 (*Solorzano*); *People v. Govea* (2009) 175 Cal.App.4th 57, 61 (*Govea*).)[9]

A trial court's erroneous failure to conduct a *Marsden* hearing is reviewed for prejudice under the harmless-beyond-a-reasonable-doubt standard. (*Marsden*, *supra*, 2 Cal.3d at p. 126, citing *Chapman v. California* (1967) 386 U.S. 18.)

C. *Analysis*

If Caveney sufficiently invoked his right to a *Marsden* hearing, then the trial court erred in concluding it lacked the authority to conduct one while criminal proceedings were suspended pending the competency determination. (*Taylor*, *supra*, 48 Cal.4th at pp. 600-601; *Solorzano*, *supra*, 126 Cal.App.4th at p. 1069; *Govea*, *supra*, 175 Cal.App.4th at p. 61.) And while the parties vigorously debate whether Caveney sufficiently

---

9 By contrast, trial courts lack the authority to rule on *Faretta* self-representation motions while criminal proceedings are suspended pending competency determinations. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1108.)

articulated his desire for a *Marsden* hearing, we conclude we need not resolve this dispute because the record shows that any error was harmless beyond a reasonable doubt.

Any potential prejudice was mitigated by the fact the trial court eventually conducted a comprehensive *Marsden* hearing. Although Caveney emphasizes that this hearing did not occur until *after* the competency proceedings were complete, nothing in the record suggests this prevented Caveney from raising issues that preceded or coincided with the competency proceedings. To the contrary, the record shows Caveney raised both types of issues.

For example, the grievance regarding filing a section 995 motion relates to a motion Magorien filed in August 2016, which preceded the competency proceedings by about five months. The issue involving "explain[ing] the proceedings" and the significance of strikes began with Magorien's "very first hearing" (the record shows this occurred in May 2016), which preceded the competency proceedings by about seven months. The record also shows the court and counsel extensively discussed this with Caveney during plea negotiations.

The issues involving unresponsiveness to Caveney's emails and Magorien's allegedly "abusive" behavior coincided with the competency proceedings. The trial court was satisfied with Magorien's explanations of each issue, and nothing suggests the court would have reached a different conclusion had the court addressed the issues a few months earlier.

At bottom, Caveney's grievance with Magorien was that the mere expression of doubt as to his competency delayed the trial, which Caveney was eager to begin. The trial court ultimately found Caveney competent, and he proceeded to trial.

On this record, we are satisfied beyond a reasonable doubt that the delay in conducting a *Marsden* hearing neither prevented Caveney from presenting issues regarding Magorien's handling of the competency proceeding nor affected the trial court's resolution of the issues he raised.

Caveney's heavy reliance on *Solorzano*, *supra*, 126 Cal.App.4th 1063 to support a contrary conclusion is misplaced. There, the trial court erred by failing to conduct a *Marsden* hearing while criminal proceedings were suspended to evaluate the defendant's competence. The Court of Appeal explained that the error was prejudicial because the defendant wanted to be declared incompetent, and his grievances with counsel *related directly to counsel's handling of the competency proceedings* (i.e., counsel failed to obtain school and medical records that would have supported the defendant's claim of incompetence). (*Id.* at pp. 1066-1067, 1069-1071.)

Here, by contrast, Caveney wanted to be declared competent (so he could proceed promptly to trial) and none of his grievances related—directly or indirectly—to the handling of the competency proceeding. Indeed, Caveney has not identified, even conceptually, any concerns about his representation during the competency proceeding that might have altered the outcome.

Accordingly, assuming the trial court erred by failing to conduct a *Marsden* hearing while criminal proceedings were suspended to evaluate Caveney's mental competence, we are satisfied beyond a reasonable doubt that the error did not prejudice him.

III. *Conduct Credits*

Caveney requests that we direct the trial court to correct the record to expressly reflect that he earned 280 days of conduct credits based on his 280 days in custody. The Attorney General agrees this relief is appropriate. So do we.

At sentencing, the trial court placed Caveney on probation for three years, subject to the condition (among others) that he serve 365 days in county jail. The court determined Caveney was entitled to 280 days of actual custody credits and, as a result, "he's done his time." Implicit in this determination is that Caveney also earned conduct credits for the days he spent in custody. (§ 4019, subd. (f) ["a term of four days will be deemed to have been served for every two days spent in actual custody"]; *People v. Chilelli* (2014) 225 Cal.App.4th 581, 588 [conduct credits are earned "at a rate of two days for every two days in presentence custody."].) However, although the court's sentencing minutes refer to "PC 4019 (1/2)," the record does not expressly reflect the court's calculation of Caveney's conduct credits. We therefore remand with directions that the trial court correct the record to expressly reflect Caveney's conduct credits.

DISPOSITION

The trial court is directed to correct the record to expressly reflect Caveney's conduct credits under section 4019. In all other respects, the judgment is affirmed.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.